IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

WEDNESDAY, THE 10TH JANUARY 2007 / 20TH PAUSHA 1928

RP.No. 784 of 2006

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AGAINST THE JUDGEMENT/ORDER IN SA.166/2003

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REVIEW PETITIONER/2ND APPELLANT/RESPONDENTS/PLAINTIFFS:

1. DEVAKY AMMA (DIED).

2. KARTHIYANI AMMA @ AMMUKUTTY,
D/O.DEVAKY AMMA AND W/O.GOVINDANKUTTY MENON,
AGED 63 YEARS, THOPPIL HOUSE, UDAYAMPEROOR MURI,
MANAKUNNAM VILLAGE, KANAYANNUR TALUK.

3. GOVINDANKUTTY MENON, S/O.KUNJIKRISHNA
MENON, AGED 69 YEARS, THOPPIL HOUSE,
UDAYAMPEROOR MURI, MANAKUNNAM VILLAGE,
KANAYANNUR TALUK.

BY ADV. SRI.K.J.KURIACHAN

RESPONDENTS/APPELLANTS/DEFENDANTS:

1. DEVAYANI AMMA, D/O.NANGELI AMMA AND
W/O.GOPALA PILLAI VAIDYAN, AGED 80 YEARS,
THOPPIL HOUSE, UDAYAMPEROOR MURI,
MANAKUNNAM VILLAGE, KANAYANNUR TALUK.

2. PARUKUTTY AMMA, D/O.NANGELI AMMA
AND W/O.NARAYANAN NAIR, AGED 76 YEARS,
THOPPIL HOUSE, UDAYAMPEROOR MURI,
MANAKUNNAM VILLAGE, KANAYANNUR TALUK.

BY ADV. SRI.A.BALAGOPALAN
SRI.A.RAJAGOPALAN
SRI.K.C.CHARLES
SRI.PRAKASH P.GEORGE
SRI.SOJO J.KALLIDUKKIL

THIS REVIEW PETITION HAVING COME UP FOR ADMISSION ON 10/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.P. Balachandran, J.

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R.P.No.784/2006 in S.A.No.166/2003

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**ORDER**

This petition for review has been filed by the petitioners/appellants to review the judgment passed by this Court on 9.5.2006 in S.A.No.166/03 and to allow the second appeal.

2. The main contention that is advanced by the counsel for the petitioners is that the pathway provided under Exhibit A1 partition deed, as per law, cannot be lost by non user and that nobody has a case that the petitioners/appellants are not using the pathway for access to the plaint 'A' schedule property. Plaint 'B' schedule pathway is on the northern side of plaint 'A' schedule property belonging to the petitioners and on the northern side of plaint 'B' schedule property is the property of the respondents. In this context, it is worthy to note that the first respondent,

along with one Gopala Pillai Vaidyan, instituted O.S.No.839/82 before the Munsiff's Court, Ernakulam for a decree of permanent injunction in relation to the property on the north of plaint 'A' schedule property belonging to the present petitioners/ appellants. In the said suit, the present petitioners/appellants, who were the defendants, contended that a pathway is provided for them along the northern side of their property as per Exhibit A1 partition deed of 1095 M.E. Accepting the contention of the present petitioners/appellants, decree for injunction was granted in favour of the plaintiffs in O.S.No.839/82 by Exhibit A2 judgment, only as regards the extent excluding the pathway. In Exhibit A2 judgment, it is specifically provided that the defendants therein, who are the appellants and the petitioners in the review petition before me are allowed to use the pathway existing to the north of the “Mannumad”, existing along the doted line in red colour, measuring 334 links in Exhibit

C1(a) plan and Exhibit C1(a) plan was made part of the decree in that suit. This "Mannumadu" is the northern boundary of the plaint 'A' schedule property.

3. A.S.No.199/86 was filed by the present petitioners against the decree in Exhibit A2 suit and the judgment therein is Exhibit A3. In paragraph 3 of Exhibit A3 judgment, it was observed as follows:

> "At the time of hearing of this appeal, on behalf of the appellants, the third appellant has filed a statement to the effect that although he has several contentions in the appeal, what the appellants really require is a clarification regarding the pathway allowed to be used by the lower court and mentioned in the decree and judgment of the lower court."

In paragraph 3 itself, the appellate court observed further as follows:

> "After hearing the counsel on both sides, it appears that it is better to clarify the position regarding the pathway, although it appears that the direction by the lower court regarding this pathway is not that much confusing as complained of by the appellants."

Accordingly, it was made clear in paragraph 4 of Exhibit A3 judgment as follows:

> "Therefore, I make it clear and it is hereby clarified that the way mentioned in the decree and judgment of the lower court, as allowed to be used by the appellants, is the way marked along with doted line in red colour seen just above the figure 334 in Exhibit C1(a) plan."

The appellate court also clarified that the decree and judgment of the lower court (Exhibit A2) will not in any way prevent the plaintiffs from filing any suit for relief of declaration of their right

of way and also for fixation of boundary. It was, accordingly, that the present suit O.S.No.574/96 was filed before the Principal Munsiff's Court, Ernakulam, which has finally come up before this Court as S.A.No.166/03.

4. Plaint 'B' schedule pathway mentioned in the present suit takes in more extent than the plaint 'B' schedule pathway mentioned in Exhibit A2 suit and there are standing trees of different varieties aged 6-30 years in certain portions as admitted by the parties. According to DW1, there is no pathway in existence as described in plaint 'B' schedule property. The petitioners/appellants had no explanation as to from where they obtained the area of plaint 'B' schedule pathway. So much so, the petitioners/appellants cannot be heard to contend that the area of plaint 'B' schedule pathway should be as shown in the Commissioner's Report, having an extent of two cents. There is also no convincing evidence adduced to prove that

there is such a way in existence as described in plaint 'B' schedule or that a pathway having specifications mentioned in plaint 'B' schedule had actually been carved out. Plaint 'B' schedule pathway, in relation to which right of passage was given to the petitioners/appellants vide Exhibits A2 and A3 judgments, is located exactly on the northern side of the property belonging to the petitioners/appellants and the contention that it should have specification as stated in Exhibit C1 report and Exhibit C1(a) plan is not substantiated by the description in Exhibit A1. It has to be taken, therefore, that the pathway, as provided in Exhibit A1 partition deed, is the pathway that was claimed by the petitioners in Exhibit A2 suit and upheld vide Exhibits A2 and A3 judgments. The contention of the petitioners that the pathway provided in Exhibit A1 partition deed, as per law, cannot be lost by non user does not worth merit, as the pathway is already there along the northern

side of plaint 'A' schedule property, though it may be that it is not having as much width as is desired by the petitioners.

This review petition, in the circumstances, is devoid of merit and is dismissed.

10th January, 2007 (K.P.Balachandran, Judge)

tkv